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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF LOS ANGELES

16	CHURCH OF SCIENTOLOGY OF CALIFORNIA,	)	Case No. C 420 153
17		)	
17	Plaintiff,	)	
18	vs.	)	MEMORANDUM IN SUPPORT
18		)	OF MOTION FOR CLARI-
19	GERALD ARMSTRONG, DOES 1 THROUGH	)	FICATION AND/OR
19	10, INCLUSIVE	)	RECONSIDERATION TO
20		)	PRESERVE SEAL ON ONE
20	Defendants.	)	DOCUMENT PREVIOUSLY
21	<hr/>	)	EXCLUDED FROM EVIDENCE
21	MARY SUE HUBBARD,	)	AND HELD TO BE PROTECTED
22		)	BY ATTORNEY-CLIENT
22	Intervenor.	)	PRIVILEGE, AND FIVE
23	<hr/>	)	ADDITIONAL DOCUMENTS
23	GERALD ARMSTRONG,	)	PREVIOUSLY EXCLUDED
24		)	FROM EVIDENCE AND
24	vs.	)	MAINTAINED UNDER SEAL
25	CHURCH OF SCIENTOLOGY OF CALIFORNIA,	)	
25	a California corporation, et al.,	)	Date: November __, 1988
26		)	Time:
26	Cross-Defendants.	)	Dept: 56
27	<hr/>	)	

1 Plaintiff Church of Scientology of California requests that  
2 the court clarify its order vacating the general sealing order  
3 entered in this case at the time of settlement. In particular,  
4 the Church requests that the court make clear that its order is  
5 not intended to and does not vacate earlier orders of this  
6 court, entered at the time of and at the conclusion of the trial  
7 herein, and prior to the settlement and general sealing order,  
8 excluding from evidence and sealing one specific document on the  
9 basis of attorney-client privilege. In the event that the court  
10 did intend to unseal that document, we respectfully seek  
11 reconsideration of the order to that extent.

12 The relevant facts and procedural history are set forth in  
13 the declaration of Eric M. Lieberman, submitted with this  
14 motion. Briefly, they are as follows:

15 1. Plaintiff brought this action to recover thousands of  
16 pages of private and valuable documents which defendant  
17 Armstrong surreptitiously took from Church archives.

18 2. At the outset of this litigation, this court enjoined  
19 Armstrong from copying or disseminating the documents, and  
20 required him to surrender the documents to the clerk of the  
21 court, to be placed under seal. Armstrong complied with the  
22 court's order, and the documents were deposited with the clerk.  
23 Among the documents were two tape recordings of attorney-client  
24 conferences involving plaintiff Church.

25 3. During the trial, defendant attempted to introduce the  
26 tape recordings, which were marked as Exhibit 500-CCCCC  
27 ("500-5Cs") for identification only, into evidence. Plaintiff  
28 objected on grounds of attorney-client privilege, and showed

1 that the tapes were recordings of two attorney-client  
2 conferences, that the tapes inadvertently came into Armstrong's  
3 possession without the knowledge of plaintiff, and the  
4 conferences were wholly proper and lawful attempts by the  
5 plaintiff to seek legal advice on corporate and tax matters.  
6 See Declaration of Eric M. Lieberman, and exhibits attached  
7 thereto. The trial court refused to enter the tapes into  
8 evidence, and ruled that they are presumptively covered by the  
9 attorney-client privilege. The trial court maintained the seal  
10 on the exhibit at the conclusion of the trial. See Memorandum  
11 of Intended Decision, p. 2, fn. 1.

12 4. There are five other documents presently resting in the  
13 court's files which also were never entered into evidence or the  
14 public file in this case, and which have remained sealed  
15 throughout the history of this case. These documents are  
16 Exhibits 500-5K, 500-5L, 500-5O, 500-5P, 500-6O.

17 5. On September 25, 1985, the United States Department of  
18 Justice sought access to various documents in this case,  
19 including exhibit 500-CCCC (the MCCS tapes). On February 11,  
20 1985, Judge Breckenridge denied the government's motion. He  
21 ruled that the tapes were protected by the attorney-client  
22 privilege, that the Church had not waived the privilege, and  
23 that the so-called "crime-fraud" exception to the privilege was  
24 not applicable.<sup>1/</sup> On March 4, 1988, the government's appeal

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25 1. In rejecting the government's assertion that the  
26 crime-fraud exception applies, Judge Breckenridge followed  
27 well-established California law that a California court must  
28 look only to evidence independent of the communications  
themselves. See Dickerson v. Superior Court (1982) 135

1 from Judge Breckenridge's ruling was dismissed.

2 6. Subsequent to Judge Breckenridge's order of February  
3 11, 1985, the Internal Revenue Service issued an administrative  
4 summons to the clerk of the Superior Court demanding that the  
5 clerk turn over various documents in this case, including  
6 exhibit 500-5Cs, for use in an ongoing IRS investigation. The  
7 plaintiff herein intervened in the proceeding and opposed  
8 production of the tapes on grounds of attorney-client privilege.  
9 The United States District Court for the Central District of Los  
10 Angeles (Harry Hupp, J.) held that the MCCS tapes were  
11 privileged, and denied enforcement of the summons with respect  
12 to the tapes.<sup>2/</sup> Judge Hupp's decision was affirmed by a  
13 panel of the Ninth Circuit Court of Appeals, United States v.  
14 Zolin (1987) 809 F.2d 1411, and by the Ninth Circuit, sitting  
15 en banc (1988) 842 F.2d 1135. (The Ninth Circuit panel and  
16 the en banc court precluded counsel from referring to the  
17 contents of the tapes at oral argument, because of the public  
18 nature of the hearings.) The Supreme Court has recently granted  
19 certiorari on the question of whether the Ninth Circuit and  
20 the District Court followed the correct federal court procedure

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(footnote cont'd)

22 Cal.App.3d 93, 100, 185 Cal.Rptr. 97; Nowell v. Superior  
23 Court (1963) 223 Cal.App.2d 652, 657, 36 Cal.Rptr.

24 21. Corydon's assertion (Reply Memo at 8, Para. 24) that  
25 California law permits or requires the court to review the  
26 communications at issue is not only unsupported by authority,  
27 but unsupportable.

28 2. Judge Hupp did order limited enforcement of the summons  
with respect to the five other documents which remain under seal  
in this court's file. See footnote 1 supra. Judge Hupp  
prohibited the IRS from disseminating or disclosing the contents  
of those documents to any other federal agency.

1 in determining that the privileged MCCS tapes (exhibit 500-5Cs)  
2 were not subject to the "crime-fraud" exception to the  
3 attorney-client privilege. The issue will be argued in March  
4 1989.<sup>3/</sup> See Declaration of Eric M. Lieberman, paragraphs  
5 10-14.

6 7. Meanwhile, while the collateral litigation with the  
7 federal agencies was proceeding in the state and federal courts,  
8 the parties in this case reached a settlement of the Church's  
9 underlying claim for return of the documents, and of Armstrong's  
10 counterclaims. Pursuant to that settlement, all documents in  
11 the court file were to be returned to the Church, and the file  
12 was to be sealed. This reflected the fact that the underlying  
13 purpose of the litigation was to protect the privileged and  
14 private documents which Armstrong had taken. The MCCS tapes,  
15 and the five additional previously sealed documents, however,  
16 were not returned because of the ongoing litigation in the  
17 federal courts in the Zolin case.

#### 18 DISCUSSION

19 In vacating the general seal on the court file imposed by  
20 Judge Breckenridge at the time of the settlement of this case,  
21 this court did not explicitly address itself to the separate  
22 preexisting seals on the MCCS tapes. Those sealing orders, as  
23 demonstrated above, was entered on the basis of attorney-client  
24 privilege at the time of trial; it had nothing to do with the  
25 general sealing order entered subsequently at the time of

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26 3. The Supreme Court also granted certiorari on the  
27 question of the limitation upon IRS disclosure of summonsed  
28 documents to other federal agencies.

1 settlement. Moreover, the MCCS tapes were not admitted as  
2 exhibits at trial, and form no part of the record of trial.

3 At the hearing on November 9, this court observed:

4 Any privileged document that was filed, obviously,  
5 the privilege was terminated, and, therefore,  
6 there's no grounds for keeping anything that's in  
7 this public file private or secret.

8 Reporter's transcript at 1. The MCCS tapes, however, were not  
9 "filed" in the "public file" in this case. They neither were  
10 entered into evidence nor submitted in connection with pleadings  
11 or discovery proceedings. They exist in the court file only  
12 because defendant Armstrong was ordered to turn them over to the  
13 court clerk, under seal, where they have remained to this day.  
14 This court and the federal courts have assiduously protected the  
15 private and privileged nature of the tapes, to this date. The  
16 privilege has never been "terminated," and the tapes should be  
17 kept "private or secret" because they are privileged.

18 This court acknowledged on November 9 that attorney-client  
19 documents may be filed in camera without destroying the  
20 privilege. Reporter's Transcript at 4. We request that this  
21 court clarify that its unsealing order is not intended to and  
22 does not destroy the privilege with respect to the MCCS tapes,  
23 and that the tapes shall remain under seal.

24 In the event the court did intend to unseal the MCCS tapes,  
25 we respectfully request reconsideration. The privileged nature  
26 of the tapes is beyond contravention, as has been held by Judge  
27 Breckenridge twice, by Federal Judge Hupp, by a unanimous panel  
28 of the Ninth Circuit, and by the Ninth Circuit, sitting en  
banc. Even the dissenting judge from the Ninth Circuit en

1 banc decision agreed that the tapes are privileged; his  
2 dissent went only to the question of the proper procedure by  
3 which federal courts should determine applicability of the  
4 crime-fraud exception. United States v. Zolin, 842 F.2d at  
5 1136-39. And it is only with respect to that procedural issue  
6 that the Supreme Court has granted certiorari.

7 In the face of these repeated judicial affirmances of the  
8 privileged nature of the MCCS tapes, movants have presented no  
9 facts or arguments to breach the privilege. Indeed, in their  
10 belatedly filed reply papers, Corydon implicitly acknowledges  
11 that he is not entitled to unseal attorney-client privileged  
12 documents. See Reply to Opposition to Motion to Unseal Files,  
13 p. 11.

#### 14 CONCLUSION

15 The MCCS tapes were not entered into evidence in this case.  
16 They were sealed by Judge Breckenridge on the basis of the  
17 attorney-client privilege. Judge Breckenridge, Judge Hupp and  
18 the Ninth Circuit en banc have sustained the privilege  
19 against vigorous attack by the federal government. The movants  
20 herein have shown no reason to depart from those rulings, which  
21 indubitably were correct.

22 Accordingly, this court should clarify or amend its order  
23 to specifically provide that the MCCS tapes remain under seal on  
24 the ground of attorney-client privilege.

25 Similarly, the five additional documents which have  
26 remained under seal should not be disclosed or unsealed. They,

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1 too, have never appeared in the public record or been admitted  
2 into evidence at trial.

3 Dated: November 15, 1988

Respectfully submitted,

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